



US Army Corps
of Engineers

Construction Bulletin

No. 98-7 Issuing Office: CEMP-EC Issue Date: 8/3.98 Exp. Date: 31 DEC 2000

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Subject: Outsourcing of Construction Management Support Services

Applicability: GUIDANCE

1. REFERENCES:

- a. OFPP Policy Letter 92-1, Inherently Governmental Functions, dated September 23, 1992; Federal Register, Volume 57, page 45096, September 30, 1992.
- b. OMB Circular No. A-76 (Revised), Performance of Commercial Activities, dated August 4, 1983.
- c. OFPP Policy Letter 93-1, Management Oversight of Service Contracting, dated May 18, 1994; Federal Register, Volume 59, page 26818.
- d. GAO Report to the Chairman, Federal Service, Post Office and Civil Service Subcommittee, Committee on Governmental Affairs, U.S. Senate, dated November 1991 - GOVERNMENT CONTRACTORS: Are Service Contractors Performing Inherently Governmental Functions? (Note: This reference provides useful information, but is not binding on executive agencies including the Corps.)
- e. Engineer Regulation (ER) 715-1-20, Architect-Engineer Contracting, dated March 21, 1997.

2. PURPOSE: In light of current management initiatives to accomplish more with fewer resources, there is an increasing need to contract out construction management services. Construction management support service contracts are particularly effective for providing specialized skills or relatively short-term resources to meet temporary shortfalls. The purpose of this Construction Bulletin is to provide guidance on (1) recognizing "inherently governmental" functions which are inappropriate for contracting, (2) avoiding personal services contracts as described in FAR 37.104 and (3) determining whether contracts should be procured as architect-engineer (A-E) services.

3. RECOGNITION OF "INHERENTLY GOVERNMENTAL" FUNCTIONS

a. While many services can be provided by commercial sources, we must be careful to avoid unacceptable transfer of official accountability to contractors by knowing how to identify inherently governmental functions that must be performed only by Government employees. Contractor services should not be used in performing work of a policy, decision-making, or managerial nature which is the direct responsibility of agency officials. References (a) and (b) define a Governmental function as "...a function which is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government... Governmental functions normally fall into two categories: (1) The act of governing; i.e., the discretionary exercise of Government authority... and (2) Monetary transactions and entitlements..." According to Reference (c), "When contracting for services, agencies must ensure that any final agency action reflects the informed, independent judgment of agency officials." Contractors thus must not be allowed to perform inherently Governmental functions as defined in OFPP Policy Letter 92-1, Inherently Governmental Functions, and as described in FAR, subpart 7.5.

b. Distinguishing between functions which can be outsourced and ones which are inherently governmental is often difficult, and a judgment call must be made based upon an analysis of the facts specific to each case. According to Reference (d), "A key criterion in determining whether service contracts are appropriate is whether the government maintains sufficient in-house capability to be thoroughly in control of the policy and management functions of the agency. In this context, government decision making power means more than simply being a final authority or signatory to a document. Government officials should be active throughout the decision making process... Essentially, GAO believes that identifying the governmental functions to be reserved for government officials depends on the agency's relationship to the contractor and the technical and management capacity of the agency."

c. Examples of inherently governmental functions which shall not be outsourced include:

- (1) The direction and control of Federal employees.
- (2) The selection or nonselection of individuals for Federal Government employment.
- (3) The determination of what Government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency).

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- (4) In Federal procurement activities with respect to prime contracts,
 - (a) determining what supplies or services are to be acquired by the Government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);
 - (b) participating as a voting member on any source selection boards;
 - (c) approval of any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;
 - (d) awarding contracts;
 - (e) administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services);
 - (f) terminating contracts; and
 - (g) determining whether contract costs are reasonable, allocable, and allowable.
 - (5) The approval of agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests.
 - (6) Approval of government estimates.
 - (7) Negotiation of contracts including contract modifications.
 - (8) Determination of compliance or noncompliance with labor requirements such as Davis-Bacon wage rates.
 - (9) Certification of payment.
- d. Examples of construction management support functions generally considered not to be inherently governmental functions which are usually appropriate for outsourcing include:

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- (1) Providing technical advice to the Government evaluator of another contractor's performance.
- (2) Services in support of acquisition planning.
- (3) Assistance in contract management.
- (4) Technical evaluation of contract proposals.
- (5) Assistance in the development of statements of work.
- (6) Support in preparing responses to Freedom of Information Act requests.
- (7) Participating as technical advisors to a source selection or source evaluation board.
- (8) Providing inspection services. (Includes safety inspections, daily quality assurance inspection/testing/reporting, and specialized quality assurance testing/inspection.)
- (9) Performing Biddability, Constructability, Operability and Environmental (BCOE) reviews.
- (10) Preparing and analyzing schedules.
- (11) Analyzing delay impact.
- (12) Reviewing submittals and pre-work plans.
- (13) Preparing government estimates.
- (14) Providing technical support during negotiation of contracts or contract modifications.
- (15) Analyzing changes and claims.
- (16) Developing payment estimates.

As a reminder, while the functions listed above are generally considered not to be inherently governmental, the approval of these functions is inherently governmental and therefore not appropriate for contracting.

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4. SCOPES OF SERVICES AND CONTRACT TYPES

a. **Scopes of Services:** According to FAR 37.104, "...a personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel," and this type of relationship "occurs when, as a result of (i) the contract's terms or (ii) the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee." Because specific authorization by statute is required for use of personal services contracts, it is important to avoid contracts which can be construed as such by writing sufficiently detailed, task- or product-specific scopes of services with specified performance periods. Vague phrases such as "ensure that the contractor's three phase inspection system is operating," "contract administration activities" or "quality assurance activities" must be supported by deliverable tasks such as "conduct daily quality assurance inspections and prepare daily quality assurance reports in accordance with requirements of ER 1180-1-6," "perform all quality assurance testing in accordance with contract requirements," "review, research and prepare recommended responses to contractor Requests for Information (RFIs) (approximately ten per week)," or "prepare independent cost estimates for contract modifications (approximately ten per week)." Negotiating contracts or delivery orders based upon specific positions for a specified timeframe (e.g., Civil Engineering Technician for 8 months) should be avoided since they have the distinct appearance of personal services.

b. **Contract Types/Examples:** While a firm-fixed-price contract is a viable means of acquiring construction management support services, an indefinite delivery type contract offers more flexibility to adapt to changing workloads. Indefinite delivery contracts can be based upon negotiated unit prices for specific tasks (e.g. preparing a cost estimate for a construction modification of a specified size/complexity), or negotiated hourly wage rates for various disciplines. The main advantage of negotiated unit prices for specific tasks is that delivery orders can be executed quickly without negotiations. Of course, construction management support services may be included as an option in original A-E design contracts. Examples of scopes of services being used successfully by some of our districts are available upon request from CEMP-EC.

5. CLASSIFICATION OF CONTRACTS AS ARCHITECT-ENGINEER SERVICES

a. A contract must be procured as architect-engineer (A-E) services in accordance with the procedures in FAR Subpart 36.6 when the statement of work includes work that is A-E services, and the A-E services constitute a substantial or dominant portion of the contract. The essential

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test is whether significant professional architectural and/or engineering judgment and approval is required, and not specifically whether performance or review by a registered architect or engineer is required. FAR 36.601-4(a) describes four categories of A-E services:

(1) "Professional services of an architectural or engineering nature, as defined by applicable State law, which the State law requires to be performed or approved by a registered architect or engineer."

(2) "Professional services of an architectural or engineering nature associated with design or construction of real property."

(3) "Other professional services of an architectural or engineering nature or services incidental thereto (including ...evaluations, ...construction phase services, ...drawing reviews...) that logically or justifiably require performance by registered architects or engineers or their employees."

(4) "Professional surveying and mapping services of an architectural or engineering nature."

b. The following is an example from Reference (e) Appendix B: "A contract for construction phase services, such as shop drawing review, evaluation of construction methods, and interpretation of plans and specifications, is A-E services. However, a contract for construction phase services that is principally for materials testing, quantity verification or materials scheduling is not A-E services." For detailed guidance with more examples on determining whether a particular contract should be procured as A-E services, see Reference (e).

c. Contracts that are not substantially or dominantly A-E services should be procured in accordance with FAR Part 15, Contracting By Negotiation, since both quality and price would be considered in the award.

6. When used properly, construction management support services can be an effective means of supplementing our shrinking workforce. However, to maintain opportunities for the continued professional development of the U.S. Army Corps' emerging leaders, non-core functions should never be 100 percent outsourced. Some amount of hands-on experience and expertise should always be kept in-house. This Construction Bulletin was coordinated with the following HQUSACE organizations: Programs Management Division (CEMP-M), and the Office of the Chief Counsel (CECC-C).

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Note: Do you use the term "Title II Services" to refer to construction management support services? Have you ever wondered what "Title II" means? "Title II" is not a reference to any statutory "title," and there is no legal significance to the term. The terms "Title I" and "Title II" apparently originated from the 1940s when contracts were broken down into "titles" instead of "sections." "Title II" of A-E contracts was an option the Government would exercise to contract for A-E services to supervise the construction, prepare record drawings, and check shop and working drawings. So, while most people will know what you mean when you say "Title II Services," a better term to use is "construction management support services."

A handwritten signature in black ink, appearing to read 'K. Cheung', is written over the printed name.

KISUK CHEUNG, P.E.
Chief, Engineering and Construction Division